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OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2640

RIN 3209-AA09

Interpretation, Exemptions and Waiver Guidance Concerning the Federal Criminal Conflict of Interest Statute Prohibiting Acts Affecting a Personal Financial Interest; Amendment to Definition of “Employee”

AGENCY: Office of Government Ethics (OGE).

ACTION: Interim final rule with request for comments.

SUMMARY: The U.S. Office of Government Ethics is issuing this interim final rule to make a technical modification to the definition of “employee” in its regulations implementing the federal criminal conflict of interest statute concerning acts affecting a personal financial interest, in order to ensure their continued applicability to all individuals subject to requirements of the statute.

DATES: This interim regulation is effective **[insert date of publication in the FEDERAL REGISTER]**. Comments are invited and are due in writing by **[insert date 60 days after date of publication in the FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, in writing, to OGE on this interim final rule, identified by RIN 3209-AA09, by any of the following methods:

E-Mail: usoge@oge.gov. Include the reference “Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting A Personal Financial Interest); Amendment to Definition of ‘Employee’” in the subject line of the message.

Fax: (202) 482-9237.

Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue, N.W., Washington, DC 20005-3917, Attention: “Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting A Personal Financial Interest); Amendment to Definition of ‘Employee.’”

Instructions: All submissions must include OGE’s agency name and the Regulation Identifier Number (RIN), 3209-AA09, for this rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and be subject to public disclosure. Comments may be posted on OGE’s website, www.oge.gov. Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Christopher J. Swartz, Assistant Counsel, Office of Government Ethics, Suite 500, 1201 New York Avenue N.W., Washington, DC 20005-3917; Telephone: 202-482-9300; TTY: 800-877-8339; FAX: 202-482-9237.

SUPPLEMENTARY INFORMATION:

I. Background

The U.S. Office of Government Ethics (OGE) is issuing this interim final rule making a technical modification to the definition of “employee” in its regulations implementing 18 U.S.C. 208. Section 208(a) prohibits participation in particular matters affecting a covered individual’s personal and imputed financial interests. Section 208(b)(2) authorizes OGE to promulgate regulatory exemptions describing financial interests that are “too remote or too inconsequential” to warrant disqualification pursuant to section 208(a). Pursuant to 5 U.S.C. app. 402(b)(1) and Executive Order 12674 of April 12, 1989 (as modified by Executive Order 12731), OGE is responsible for providing uniform regulations interpreting section 208. In addition, section 208(d)(2) specifically directs OGE to adopt “uniform regulations for... exemptions” from the applicability of section 208(a). Consistent with these authorities, in 1996 OGE issued uniform regulations at 5 CFR part 2640 interpreting 18 U.S.C. 208 and establishing exemptions for all individuals subject to section 208(a). 61 FR 66830 (Dec. 18, 1996).

OGE established this uniform coverage by defining “employee” to mean “an officer or employee of the executive branch of the United States, or of any independent

agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia,” including “a special Government employee as defined in 18 U.S.C. 202.” 5 CFR 2640.102(b). The language of this definition in 5 CFR part 2640 carefully covered all individuals then subject to the statute, including certain individuals who were not executive branch employees. Compare id. with 18 U.S.C. 208(a) (covering “an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee”). The applicability of 5 CFR part 2640 was, thus, coextensive with the applicability of section 208.

Recently, however, a cross-reference in the organic statute of a newly created board has expanded the coverage of the requirements of section 208 to include the board’s members and staff, who would not otherwise be subject to section 208. Public Law 114-187, section 109(a) (2016). In order to ensure the continued applicability of 5 CFR part 2640 to all individuals subject to section 208, this interim regulation adds the phrase “..., or any other individual subject to requirements of 18 U.S.C. 208” at the end of the first sentence of the definition of “employee.” This technical amendment will guard against uncertainty as to the applicability of 5 CFR part 2640 to the members and staff of this board, as well as to others who may in the future become subject to section 208. Prior to issuing this regulation, OGE consulted with the Office of Personnel Management and the Department of Justice, and pursuant to section 201(c) of Executive

Order 12674, as modified by Executive Order 12731, has obtained the concurrence of the Department of Justice.

II. Matters of Regulatory Procedure

Administrative Procedure Act

Pursuant to sections 553(b) and 553(d)(3) of title 5 of the United States Code, the Director of the Office of Government Ethics has found good cause for dispensing with the usual requirements of notice and comment and a 30-day delay in the rule's effective date. Because this minor amendment is strictly technical in nature, providing notice and comment and delaying the effective date are unnecessary. Moreover, in clarifying the meaning of "employee," this rule is an interpretative rule and thus exempt from notice and comment and a delay in effective date pursuant to 5 U.S.C. 553(b) and 553(d)(2), respectively. Finally, this rule recognizes exemptions, which exempts the rule from the 30-day delayed effective date pursuant to 5 U.S.C. 553(d)(1). Nonetheless, this interim final rule provides a 60-day comment period for agencies and the public. The Office of Government Ethics will review any comments received during the comment period and consider any modifications to this rule that appear warranted.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this interim final rule would not have a significant economic impact on a substantial number of small entities because it primarily affects covered employees.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this interim final rule would not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the interim final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

Executive Order 12866

In promulgating this rule amendment, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth

in section 1 of Executive Order 12866, Regulatory Planning and Review. The Office of Management and Budget has determined that this technical rule amendment is not “significant” under Executive Order 12866.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this interim final rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2640

Conflict of interests, Government employees.

Approved: August 30, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics amends 5 CFR part 2640 as follows:

**PART 2640-INTERPRETATION, EXEMPTIONS AND WAIVER GUIDANCE
CONCERNING 18 U.S.C. 208 (ACTS AFFECTING A PERSONAL FINANCIAL
INTEREST)**

1. The authority citation for part 2640 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 18 U.S.C. 208; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Revise the first sentence of § 2640.102(b) to read as follows:

§ 2640.102 Definitions.

* * * * *

(b) Employee means an officer or employee of the executive branch of the United States, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, an officer or employee of the District of Columbia, or any other individual subject to requirements of 18 U.S.C. 208. * * *

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